

(January 5, 2004)

Procedure and Protest by the Contractor

Section 1-04.5 is deleted in its entirety and replaced with the following:

The Contractor accepts all requirements of a change order by: (1) endorsing it, (2) writing a separate acceptance, or (3) not protesting in the way this section provides. A change order that is not protested as provided in this section shall be full payment and final settlement of all claims for contract time and for all costs of any kind, including costs of delays, related to any work either covered or affected by the change. By not protesting as this section provides, the Contractor also waives any additional entitlement and accepts from the Engineer any written or oral order (including directions, instructions, interpretations, and determinations).

If in disagreement with anything required in a change order, another written order, or an oral order from the Engineer, including any direction, instruction, interpretation, or determination by the Engineer, the Contractor shall:

1. Immediately give a signed written notice of protest to the Project Engineer or the Project Engineer's field inspectors before doing the work;
2. Supplement the written protest within 30 calendar days with a written statement and supporting documents providing the following:
 - a. The date and nature of the protested order, direction, instruction, interpretation or determination;
 - b. A full discussion of the circumstances which caused the protest, including names of persons involved, time, duration and nature of the work involved, and a review of the plans and provisions referenced to support the protest;
 - c. The estimated dollar cost, if any, of the protested work and a detailed breakdown showing how that estimate was determined; and
 - d. An analysis of the progress schedule showing the schedule change or disruption if the Contractor is asserting a schedule change or disruption; and
 - e. If the protest is continuing, the information required above shall be supplemented monthly until the protest is resolved.

Throughout any protested work, the Contractor shall keep complete records of extra costs and time incurred. The Contractor shall permit the Engineer access to these and any other records related to the protested work as determined by the Engineer.

The Engineer will evaluate all protests provided the procedures in this section are followed. If the Engineer determines that a protest is valid, the Engineer will adjust payment for work or time by an equitable adjustment in accordance with Section 1-09.4. Extensions of time will be evaluated in accordance with Section 1-08.8. No adjustment will be made for an invalid protest.

If the Engineer determines that the protest is invalid, that determination, with an explanation, shall be provided in writing to the Contractor. The determination will be

provided within seven calendar days after receipt of the Contractor's supplemental written statement described in item 2 above.

If the Contractor does not accept the Engineer's determination, either party may refer the dispute to a Disputes Review Board. If the parties mutually agree, the protest may be defaulted to Section 1-09.11(2), Claims, bypassing the Disputes Review Board process.

In spite of any protest, the Contractor shall proceed promptly with the work as the Engineer orders.

By failing to follow the procedures of this section, the Contractor completely waives any claims for protested work.

Disputes Review Board

In order to assist in the resolution of disputes arising out of the work of this project, the contract provides for the establishment of a Disputes Review Board, hereinafter called the "Board." The Board is created as part of the disputes resolution process to be utilized when normal Contracting Agency-Contractor dispute resolution is unsuccessful and prior to the filing of a Section 1-09.11(2) claim.

The Board will consider disputes referred to it and furnish recommendations to the Contracting Agency and Contractor to assist in the resolution of the differences between them. The purpose of the Board response to such issues is to provide nonbinding findings and recommendations designed to expose the disputing parties to an independent view of the dispute.

The Board members will be especially knowledgeable in the type of construction involved in the Project and shall discharge their responsibilities impartially and independently considering the facts and conditions related to the matters under consideration and the provisions of the Contract .

The Board shall consist of one member selected by the Contracting Agency and one member selected by the Contractor, with these two members to select the third member. The first two members shall be mutually acceptable to both the Contracting Agency and the Contractor. If one or both of the two members selected are not acceptable to the Contracting Agency or Contractor, another selection shall be made.

The Contracting Agency and Contractor shall each select their member and negotiate an agreement, separate and apart from this contract, with their respective Board member within the first 60 calendar days after execution of the contract. The agreements with these two Board members shall contain language imposing the "Scope of Work" and "Suggested Administrative Procedures" included in the Appendix to the Special Provisions. These negotiated agreements shall also include clauses that require the respective selected members to immediately pursue selection of a third member. The goal is to obtain a third Board member who will complement the first two by furnishing a needed expertise, which will facilitate the Board's operations. The Contracting Agency has entered into "standby" agreements with a number of potential third members. The qualifications of these potential members have been reviewed and deemed acceptable by both the State of

Washington Department of Transportation and the Associated General Contractors of Washington. The names of these potential members will be provided to the first two members for consideration. If a selection can be made from the standby list, then the Board may be immediately seated with the execution of a task order under the corresponding standby agreement. Should the first two members decide to select a third member not on the list of standby candidates, then the selected person will be accepted to the Board after he or she executes a standby agreement (Third Party Member Disputes Review Board Consultant Agreement). The acceptable format for this agreement and all accompanying exhibits may be downloaded from the Internet www.wsdot.wa.gov/Consulting <<http://www.wsdot.wa.gov/Consulting>> or may be obtained from the Project Engineer. The fee for the third member shall be negotiated with the first two members and shall be included in a task order, issued by the Project Engineer after the third member standby agreement is fully executed.

In the event of an impasse in selection of the third member, either the Contracting Agency or the Contractor or both may appeal to the Thurston County Superior Court for selection of a third member by the court from a list or lists submitted to the court by the Contracting Agency and/or the Contractor. An impasse shall be considered to have been reached if the two members appointed by the Contracting Agency and the Contractor to the Board have been unable to appoint the third member in a period of 60 calendar days after the approval of the last of such two members.

In case a member of the Board needs to be replaced, the replacement member will be appointed in the same manner as the replaced member was appointed. The appointment of a replacement Board member will begin promptly upon determination of the need for replacement and shall be completed within 30 calendar days.

Service of a Board member may be terminated at any time with not less than 30 calendar days notice as follows:

1. The Contracting Agency may terminate service of the Contracting Agency appointed member.
2. The Contractor may terminate service of the Contractor appointed member.
3. The third member's services may be terminated by agreement of the other two members.
4. By resignation of the member.

Termination of a member will be followed by appointment of a substitute as specified above.

No member shall have a financial interest in the contract, except for payments for services on the Board. No member shall have been employed by either party within a period of two years prior to award of this contract; except that, service as a member of other Disputes Review Boards on other contracts will not preclude a member from serving on the Board for this contract.

Compensation for the Board members, and the expenses of operation of the Board, shall be shared by the Contracting Agency and Contractor in accordance with the following:

1. The Contracting Agency will compensate directly the wages and travel expense for its selected member.
2. The Contractor shall compensate directly the wages and travel expense for its selected member.
3. The Contracting Agency and Contractor shall share equally in the third member's wages and travel expense, and all of the operating expenses of the Board. These equally shared expenses shall be billed to and paid by the Contracting Agency. The Contractor's share will be deducted from monies due or coming due the Contractor.
4. The Contracting Agency, through the Engineer, will provide administrative services, such as conference facilities and secretarial services, to the Board and the Contracting Agency will bear the costs for this service.

Disputes Review Board Procedures

The Board, the Contracting Agency, and the Contractor shall develop by agreement the Board's rules of operation and procedures to be followed for the Project. The Agreement shall include the frequency of the Board's visits to the Project and its interactions with the Contracting Agency and the Contractor to keep abreast of the construction development and potential disputes.

In developing the Agreement, the parties shall take into consideration their respective duties and responsibilities set forth in the "Scope of Work" section of their agreements, the form of which is included in the Appendix of the Special Provisions.

The parties may also consider the "Suggested Administrative Procedures" for the Board's operation included in their agreements, the form of which is included in the Appendix of the Special Provisions. These Procedures express, in general terms, the policy for the creation and operation of the Board and are intended to supplement the Special Provisions to the extent that no conflict with such provisions is created.

Disputes, as used in this section, will refer only to protests properly submitted in accordance with Section 1-04.5. If the Engineer has determined the protest to be invalid and either the Contractor or the Contracting Agency has elected to refer the matter to the Board, then the Board shall consider the issue and provide recommendations concerning:

1. The interpretation of the Contract
2. Entitlement to additional compensation or time for performance
3. The amount of additional compensation or time for performance following a recommendation of entitlement by the Board provided that; (1) the parties

were not able to reach a resolution as to the amount of the equitable adjustment or time; (2) the Engineer has made a unilateral determination of the amount of compensation for time; and (3) the Contractor has protested the Engineer's unilateral determination.

4. Other subjects mutually agreed by the Contracting Agency and Contractor to be a Board issue.

Procedure for Consideration of Disputes

1. Once a protest has been denied as described in Section 1-04.5, the Board members will be contacted and advised of the existence of the dispute. A hearing will be scheduled to be conducted at the next regular project visit or at such other time, as agreed to by the parties.
2. The Contractor and the Contracting Agency shall each be afforded an opportunity to be heard by the Board and to offer evidence. Either party furnishing any written evidence or documentation to the Board must furnish copies of such information to the other party a minimum of 15 calendar days prior to the date the Board sets to convene the hearing for the dispute. Either party shall produce such additional evidence as the Board may deem necessary to an understanding and determination of the dispute and furnish copies to the other party.
3. After the hearing is concluded, the Board shall meet in private and reach a conclusion supported by two or more members. Its findings and recommendations, together with its reasons shall then be submitted as a written report to both parties. The recommendations shall be based on the pertinent contract provisions and facts and circumstances involved in the dispute. The Contract shall be interpreted and construed in accordance with the laws of the State of Washington. The Board shall make every effort to reach a unanimous decision. If this proves impossible, the dissenting member may prepare a minority report.
4. Within 30 calendar days of receiving the Board recommendations, both the Contracting Agency and the Contractor shall respond to the other in writing signifying that the dispute is either resolved or remains unresolved. Although both parties should place weight upon the Board recommendations, the recommendations are not binding.

In the event the Board's recommendations do not lead to resolution of the dispute, all Board records and written recommendations, including any minority reports, will be admissible as evidence in any subsequent litigation.

Submittal of a dispute to the Board will be a condition precedent to the filing for litigation in a court of law unless the Contracting Agency and the Contractor have agreed to default the dispute to Section 1-09.11(2) Claims. If the Board's assistance does not lead to resolution of the dispute, causing the Contractor to file a Section 1-09.11(2) Claim, or if the parties default the dispute to that section, full compliance by the Contractor with the provisions of that section is a contractual condition precedent to the Contractor's right to seek judicial relief.

Disputes, claims, counterclaims and other matters in question between the Contracting Agency and the Contractor that are not resolved will be decided in the Superior Court of Thurston County, Washington, which shall have exclusive jurisdiction and venue over all matters in question between the Contracting Agency and the Contractor.

The Contract shall be interpreted and construed in accordance with the laws of the State of Washington.